

# MS 774 Retention of Counsel and Payment of Expenses

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## 1.0 Purpose

This Manual Section describes Peace Corps policy for providing legal counsel to Volunteers, Trainees, and Peace Corps posts. All references in this Manual Section to Volunteers include Trainees.

## **2.0 Authorities**

Section 5(l) and Section 10(i) of the Peace Corps Act, 22 U.S.C. 2504(l) and 2509(i).

## **3.0 Retention of Counsel for Defense of Volunteers**

### **3.1 Authority**

When a Volunteer has been made a party to a foreign judicial or administrative proceeding during the Volunteer's service, the Peace Corps may:

- (a) Retain counsel for the Volunteer and pay the related legal fees;
- (b) Pay court costs, bail, and other expenses incident to the Volunteer's defense, including costs relating to investigations, counsel's travel, witness fees etc., as may be approved by the Office of the General Counsel (OGC) in advance of expenditure; and
- (c) Continue to pay such expenses after the Volunteer leaves Peace Corps service.

The Peace Corps retains sole discretion to determine whether to retain counsel or to continue the services of counsel. The retention of counsel at Peace Corps posts (Posts) is governed by the Peace Corps procurement system administered by the Chief Acquisition Officer as set forth in the Overseas Contracting Handbook. The actions necessary to be taken at a Post to retain counsel are usually a collaborative process between the Country Director who normally initiates the action to select and recommend retention of a counsel and the Contracting Officer who assures performance of necessary actions in the contracting process. The value of a contract to retain counsel executed at a Post must not exceed the applicable delegated contracting authority. For purposes of this Manual Section, the term Post is used to cover the respective actions and duties of the Country Director and the Contracting Officer under the Peace Corps procurement system.

A contract to retain counsel to represent a Volunteer may be terminated by the Post, after consultation with OGC, for cause or convenience of the U.S. Government.

### **3.2 Limitations**

- (a) Expenditures are not authorized in connection with civil actions instituted by a Volunteer as a plaintiff.
- (b) The authority to retain counsel under this Section 3.0 is generally used only when a Volunteer is party to one of the following proceedings:
  - 1. Criminal proceedings ; or
  - 2. Proceedings in which the accused's substantial rights might be denied; or
  - 3. Proceedings which might have a significant impact on U.S. Government relations with a foreign government or on other U.S. interests, legal or otherwise.
- (c) This authority may not be used for payment of fines or damages.
- (d) A Volunteer who willfully forfeits bail will be liable to the U.S. Government for all costs assumed on the Volunteer's behalf.

### **3.3 Exercise of Authority**

The Country Director must request advance legal clearance from OGC to hire counsel under this Section 3.0. The request and recommendation from the Country Director should be accompanied by as much of the following information as is available at that time:

- (a) The charge, or anticipated charge, against the Volunteer, the minimum and maximum penalties attached, and the circumstances surrounding the situation;
- (b) Whether the proceeding is civil, criminal, or a combination of both;
- (c) The normal sequence of events in such legal proceedings, an estimate of the probable timetable for those events, and the resolution of the proceedings;
- (d) The name, educational and professional background and qualifications of the recommended counsel, and how counsel was selected;
- (e) The estimated legal fee and the amount recommended by the Country Director, with supporting reasons if the amount recommended is excessive in light of the experience of the embassy in paying fees for similar services;
- (f) An estimate of any other legal costs incident to the legal proceedings;
- (g) Whether the Volunteer has requested counsel or approved the counsel selected, or both; and

Such other information that might be relevant to a determination whether it is in the best interest of the Peace Corps to hire counsel to represent the Volunteer.

In determining whether to give legal clearance, OGC may rely on information provided by the Country Director, the Department of State, and other U.S. Government resources.

Although the counsel fee is paid by the Peace Corps, the counsel is retained for the defense of the Volunteer. Therefore, decisions regarding the defense of the Volunteer rest with the Volunteer and such counsel. The role of the Peace Corps should be supportive, recognizing that the interests of the Volunteer and those of the Peace Corps may conflict. The Country Director, in consultation with OGC, should also ensure that Volunteers receive all those rights and privileges to which they are entitled under host country law and the Peace Corps country agreement.

### **3.4 Emergency Retention of Counsel or Posting of Bail**

In an emergency, a Country Director may retain counsel for a Volunteer, post bail, or both, without prior authorization from OGC. However, the Country Director must promptly notify OGC of such retention of counsel and/or posting of bail and provide the information required under Section 3.3. In addition, the Country Director must provide OGC with the information required in Section 3.3 for the retention of counsel for the remainder of the proceedings beyond the emergency period.

## **4.0 Legal Expenses for Volunteer Victims of Crime**

### **4.1 Authority**

The Peace Corps may retain counsel and pay counsel fees, court costs, investigation costs, and other expenses in support of a Volunteer who is a party, complaining witness, or otherwise participating in the prosecution of a crime against such Volunteer.

In deciding whether to exercise this authority, the following factors should be considered:

- (a) Whether the applicable jurisdiction requires a victim and victim's counsel to participate in the prosecution of a crime as a party or complaining witness (also known as a third party prosecution, *partie civile*, etc.), or requires private counsel in connection with the filing of a criminal complaint and/or investigation or reporting of a crime;
- (b) Whether the applicable jurisdiction permits a victim and victim's counsel to participate in the prosecution of a crime as a party or complaining witness, and such participation would be materially beneficial to the prosecution of the case; and
- (c) Whether the crime is sufficiently serious to justify use of the authority.

The Peace Corps may invoke or continue to use this authority to provide counsel to a Volunteer after the Volunteer leaves Peace Corps service. The Peace Corps retains sole discretion to determine whether to retain counsel or to continue the services of counsel. The contract to retain counsel to represent a Volunteer may be terminated by the Post, after consultation with OGC, for cause or convenience of the U.S. Government. The reasons to terminate a contract may include, but are not limited to, the following:

- (i) The costs of the counsel are excessive;
- (ii) The likelihood of success appears low;
- (iii) The counsel is deemed ineffective;
- (iv) The Volunteer does not actively participate in the matter; or
- (v) Other good cause or reason.

### **4.2 Exercise of Authority**

The Country Director, in consultation with the Office of Victim Advocacy and Office of Safety and Security, must request advance legal clearance from OGC to incur or pay counsel fees, court costs, and expenses for a Volunteer covered by Section 4.1. In determining whether to give legal clearance, OGC may rely on information provided by the Country Director, the Office of Victim Advocacy, the Office of Safety and Security, the Department of State, and other U.S. Government resources.

The request for advance legal clearance by the Country Director must be accompanied by as much of the following information as is available:

- (a) The reasons the Country Director believes that the seriousness of the crime or the circumstances surrounding the crime warrants the use of this authority;
- (b) Information as to whether the Volunteer victim wishes to pursue the matter;
- (c) The normal sequence of events in such legal proceedings, an estimate of the probable timetable for those events, and the resolution of the proceedings;
- (d) The name, educational and professional background and qualifications of the recommended counsel, and how the counsel was selected;
- (e) The estimated legal fee and the amount recommended by the Country Director, with supporting reasons if the amount recommended is excessive in light of the experience of the embassy in paying fees for similar services;
- (f) An estimate of any other legal costs incident to the legal proceedings;
- (g) Whether the Volunteer has requested counsel or approved the counsel selected, or both; and
- (h) Such other information that might be relevant to a determination whether it is in the best interest of the Peace Corps to hire counsel to represent the Volunteer.

### **4.3 Emergency Retention**

In the event of an emergency, the Country Director may retain counsel to represent the Volunteer without advance legal clearance from OGC. However, the Country Director must promptly notify the Office of Safety and Security, OGC, and the Office of Victim Advocacy of such retention and provide the information required under section 4.2. In addition, the Country Director must provide OGC with the information required in section 4.2. for the retention of counsel for the remainder of the proceedings beyond the emergency period.

## **5.0 Retention of Counsel for Post**

### **5.1 Retention of Counsel for Representation before a Judicial Body**

(a) The Department of Justice is responsible for all litigation involving the U.S. Government overseas and in the United States, and has the sole authority to represent the Peace Corps before a judicial body overseas. If service of process is made through diplomatic channels, which means through the Ministry of Foreign Affairs to the Embassy, OGC must be notified to permit it to work with the Department of Justice to defend the matter. If service of process, seeking to initiate a legal action or seeking testimony is made on a Post without having gone through the Ministry of Foreign Affairs to the Embassy, the Country Director must advise the OGC, as well as the Embassy's Management Officer in order to coordinate with the Department of State Office of the Legal Advisor to send a diplomatic note to the Ministry of Foreign Affairs explaining that the U.S. Government was not properly served. In such a circumstance, Post should not hire legal counsel and no U.S. citizen staff should make any appearance to testify on behalf of Peace Corps. It may be necessary for Host Country National staff to appear, but the Country Director should consult with OGC regarding the matter.

(b) Entities such as local labor courts may be considered judicial bodies, in which case proper service of process is still required, and representation will be through the Department of Justice.

(c) Country Directors are encouraged to consult with the OGC in case of any uncertainty about whether this Section 5.0 applies.

(d) Representation by the Department of Justice also may occur in certain circumstances when a Peace Corps employee is identified as a defendant. The Department of Justice makes a determination about whether its representation is necessary or appropriate. Country Directors must work with OGC and the Embassy in such circumstances. Generally, as in the United States, Peace Corps employees are not provided with representation for their personal affairs, but there may be occasions when it is not clear whether the legal matter is purely a personal affair. U.S. Direct Hires overseas should discuss with the Embassy their status in the country of assignment in the event of civil or criminal legal actions.

## **5.2 Counsel Retention to Enable Post to Perform Business Efficiently**

Posts are authorized and encouraged to retain local counsel to enable them to carry out official duties effectively. For example, local counsel might be retained under this authority to advise a staff member regarding a Peace Corps lease on real property, or on the requirements of local labor laws.

## **5.3 Report on Retention of Counsel**

The Post will immediately submit a written report to OGC concerning any retention of counsel under Section 5.2, including all the applicable information specified in Section 3.3.

## **6.0 Counsel and Expenses Related to Performance of Official Duties**

In cases concerning the performance of official duties, only the Department of Justice has the authority to employ counsel to represent the Peace Corps or overseas staff members and only the Department of Justice has the authority to pay costs in proceedings arising from Peace Corps activities or the performance of staff members' duties. The Peace Corps has no such authority.

When an overseas employee or a Post requires representation under this Section 6.0, a request to or through the Country Director should be submitted to OGC along with any documentation related to the case. When appropriate, OGC will forward the request to the Office of Foreign Litigation at the Department of Justice. The Department of Justice will decide whether to provide representation.

## **7.0 Retention of Particular Counsel**

### **7.1 Selection of Counsel**

Country Directors must have available the names of local counsel considered competent or acceptable, including information from the Embassy or previous Country Directors.

## **7.2 Retainers**

Generally, a Post must not enter into agreements with local counsel for services on a retainer basis. However, in unusual circumstances, a Post may enter into such agreements with the concurrence of the Regional Director and the Chief Acquisition Officer, and legal clearance from OGC, upon receipt of a full statement of the circumstances.

## **7.3 Counsel Contracts**

Posts should consult the Office of Acquisitions and Contract Management's online Overseas Contracting Handbook for templates for hiring overseas counsel.

## **7.4 Sole Source**

U. S. Government contracts for legal services are normally subject to competition. However, in circumstances where urgent and compelling circumstances require hiring counsel immediately, or in order to acquire expert services for current or anticipated litigation without the delay of competition, then a written justification for a sole source contract can be approved by the Post, with a signed copy retained in the Post's contract file.

## **8.0 Effective Date**

The provisions of this Manual Section shall take effect on the date of issuance.